U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE ISSUED: April 3, 1989
CASE NO. 88-INA-397

IN THE MATTER OF THE APPLICATION
FOR AN ALIEN EMPLOYMENT CERTIFI-
CATION UNDER THE IMMIGRATION AND
NATIONALITY ACT

K SUPER KQ-1540 A.M.
Employer

on behalf of

VICTOR ANGEL FUENTES
Alien

BEFORE: Litt, Chief Judge; Brenner, Guill, Schoenfeld, Tureck, and Williams, Administrative Law Judges

NAHUM LITT
Chief Judge

DECISION AND ORDER

This case arose from an application for labor certification submitted by the Employer on behalf of the Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14) (the Act). The Certifying Officer (CO) of the U.S. Department of Labor denied the application, and the Employer requested administrative-judicial review pursuant to 20 C.F.R. §656.26 (1988).[1]

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that there are not sufficient workers who are able, willing, qualified, and available at the time of

[1] All regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

application for a visa and admission into the United States and at the place where the alien is to perform such work, and that the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must apply for labor certification pursuant to §656.21. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File (A1-A53), and any written arguments of the parties. §656.27(c).

Statement of the Case

On November 19, 1986, the Employer filed an application for alien employment certification to enable the Alien to fill the position of radio announcer (international broadcaster). The duties were specified as follows: narrates news, commercials, station breaks, ad libs; memorizes scripts; keeps daily news logs; operates control console/radio transmitter; narrates games from direct observations when required. The Employer required an ability to read/write and speak Spanish, to travel with mobile radio and have one year of experience in the job offered or one year of experience as a radio announcer. The Employer also required no smoking/drinking during working hours, working overtime when required (ready for emergency calls), travelling with mobile radio all over the city, and obtaining information that will be used in the news. According to the application, the job-site was in Los Angeles and interviews were in the same city. There were no education or training requirements (A28-A59).

On November 30, 1987, the CO issued a Notice of Findings (A24-A26) that considered two aspects of the application. First the CO found that the Employer did not show a good faith effort to contact applicants in a timely manner. According to the CO, the Employer took from January 27 until February 26 to contact two of the applicants, and the letter sent had no letter head, no job description, and no telephone number. Therefore, applicant Cuadra did not have the information needed to call from Seattle to see if a trip was worthwhile. (A25). Second, the CO found that the Employer had rejected U.S. workers for other than lawful, job-related reasons. (A25). According to the CO, the Employer rejected the U.S. workers because it found the Alien to be better qualified. The CO stated that only applicants for faculty positions at the college level can be lawfully rejected on that basis. The CO found that if a U.S. worker meets the minimum, normal requirements of the job, labor certification cannot be granted, even if the Alien is better qualified. He then found that nine applicants appeared to meet the minimum requirements of the job, and that the Employer has not conclusively demonstrated that those nine applicants cannot perform the basic job duties through a combination of experience and special knowledge. The Employer was required to document that the U.S. applicants were not able, willing, qualified, or available at the time of initial consideration.

In its rebuttal of December 14, 1987, the Employer stated that it had made a good faith effort to contact all twelve applicants. (A23). Specifically, with regard to Mr. Cuadra, the Employer stated that Mr. Cuadra could have written the Employer if he was really interested. The Employer has not heard from Mr. Cuadra. "As to my reasons for rejection is that [sic] I consider Victor Angel Fuentes better qualified for this position because of his TONE and LOUDNESS." (A23). The Employer submitted a tape for comparison. The Employer stated that it would not have gone to the trouble of interviewing the applicants if it had the intention of rejecting them. The Employer also stated that it knows its needs and finds that the Alien is better qualified for the job than the applicants as a comparison of voices on the submitted tape shows. Employer further stated that it would be willing to interview all the applicants again if requested. (A23).

In the Final Determination of March 18, 1988, the CO denied certification on the grounds that the Employer had not provided documentation of a good-faith effort to recruit. The CO also found that the Employer judged applicants by a subjective standard that is not spelled out in the ETA 750A or the ad. According to the CO, since the Employer concedes that the applicants meet or exceed the stated requirements, the Employer's evaluation of applicants is based on his personal preference. (A22).

On appeal, the Employer requested review on the grounds that it has made a good faith effort to recruit and has submitted sufficient documentation with recorded tapes and explanations of each interview. (A1). It believes that the Certifying Officer has not given enough credence to its statements on rebuttal. On brief, the Employer requested a waiver to amend any deficiencies and to comply with new requirements in order to establish that alien's job opportunity is bona fide and will not impinge on the rights of U.S. workers.

Discussion and Conclusion

The CO denied certification on the ground that U.S. workers were rejected for other than lawful, job-related reasons. According to the CO, the Employer rejected the U.S. workers not because they were unqualified, but rather because the Alien was better qualified. The Employer, in rebuttal to the Notice of Findings, stated that it considered the Alien to be better qualified based on voice tone and loudness.

Under §212(a)(14) of the Act, an alien is ineligible to receive labor certification unless the Secretary of Labor determines that there are not sufficient able, willing, qualified, and available U.S. workers. Under §656.21(b)(7) of the regulations, the Employer must document lawful, job-related reasons for rejecting each U.S. applicant. Rejection of a U.S. worker on the grounds that the Alien is better qualified violates the Act, and cannot constitute a lawful, job-related reason for rejecting a U.S. worker.

The Employer stated that comparing the voices of the Alien and the U.S. workers, the Alien is better qualified based on tone and loudness. The Employer did not allege, let alone establish, that the U.S. workers were unable to perform the job duties, based on voice tone and loudness. The Employer has not demonstrated that U.S. workers were rejected for other than lawful, job-related reasons. Accordingly, the CO properly denied certification.

ORDER

The Final Determination of the Certifying Officer denying labor certification is hereby AFFIRMED.

NAHUM LITT
Chief Administrative Law Judge

NL:WB